

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re FORFEITURE OF 53 HORSES.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EDWIN KASBEN and JANET J.  
BAUMAN,

Claimants-Appellants,

and

EDWIN KASBEN, KRIS KASBEN, JAMES  
HALL, and BARBARA KINTNER,

Claimants.

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UNPUBLISHED

October 31, 2006

No. 257921

Leelanau Circuit Court

LC No. 02-005866-AV

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EDWIN KASBEN,

Defendant-Appellant.

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No. 258470

Leelanau Circuit Court

LC No. 04-006706-AV

Before: Owens, P.J., and Saad and Fort Hood, JJ.

FORT HOOD, J. (*concurring in part, dissenting in part*).

In Docket No. 258470, defendant was convicted, following a jury trial, of thirteen counts of animal neglect, MCL 750.50, a misdemeanor offense, but was acquitted of five additional

counts of animal neglect. He was sentenced to thirty days in jail and appeals by leave granted. Although defendant was only ultimately charged with eighteen counts of neglect, fifty-three horses were found on various properties owned by defendant or his family members. The fifty-three horses were removed, and a civil forfeiture proceeding was filed. When a dispute occurred regarding the ownership of the horses, the trial court held an evidentiary hearing before ordering the forfeiture of all the horses. In Docket No. 257921, defendant and Janet Bauman, a person claiming ownership of the horses, appeal by leave granted from the forfeiture decision. Defendant's criminal convictions and the order of forfeiture are affirmed. However, I would affirm the trial court's holdings in all respects. I respectfully dissent from the majority's conclusion that the trial court could not order civil forfeiture of the animals as well as restitution.

In February 2001, Officer Paul Peschel, animal control officer for the Leelanau Sheriff's Department, received a report of possible neglect of horses. Based on the report, the officer made arrangements to meet with defendant and a veterinarian regarding the care of the horses in early April 2001. The horses were located on four or five different pastures. Several horses were found with poor hair coats and large, distended bellies. A distended belly was not necessarily an indication of good health, but rather could indicate that de-worming was necessary because of parasites. The veterinarian recommended that the horses be given worming medication if it had not yet been administered. Officer Peschel continued to monitor the horses throughout the summer and into the fall. He found old and young horses mixed together in the pasture. The officer also saw horses with halter sores that were so severe, there was a separation of skin under the halter such that the underlying tendon or bone of the horse was visible. Two horses were severely emaciated, and several horses had hooves that had grown so long they were turning back up off the ground.

Dr. Molby, a veterinarian who specialized in equine practice, was warned of the condition of the horses before she was asked to examine them. Despite the warning, she was surprised at the severity of the condition of two of the horses. In fact, she was surprised that the two horses were still alive because they appeared to be nothing more than "skin and bones." Dr. Molby opined that there was a global problem with the horses. They suffered from cuts and skin conditions. There did not appear to be adequate food and water for the horses, and horses were inappropriately placed in pastures. Dominant horses were not separated from young or older horses. Although some horses were adequately fed, it appeared that dominant horses might have precluded other horses from the food source. There was debris, including old equipment, in one of the pastures. The horses appeared to have been near the area of the equipment based on the cuts and oil on their legs. Dr. Molby opined that normally horses have a good body condition score, specifically a level five or six, when winter was approaching because of the limited access to food in the pasture. However, the herd in general was suffering from poor hair coats, big rounded abdomens, indicating a high parasite count, protruding ribs, diarrhea, and skin conditions. Dr. Molby was told that defendant did not provide worming medication to the horses, but he later reported that he had de-wormed the horses. She never saw documentation to verify that the horses had been given the medication. Additionally, appropriate feed was present for the horses when a visit was announced in advance. Curly dock, feed with little nutritional value, was present when visits were unannounced.

Dr. Jan Cerro testified that she examined the horses at defendant's request. She examined two horses, determined that they were suffering from dental problems, and resolved

the problems. Defendant had expressed concern regarding horses that were not gaining weight. She reported that he took appropriate measures by de-worming the horses and began to feed them grain. Dr. Cerro testified that the abdomens of the horses appeared full and healthy and did not have the obvious look of distended abdomens associated with high parasite counts. When she saw the horses, they were appropriately separated and given hay of good quality. Only eight percent of the herd appeared to be suffering from rain rot, a skin condition. Hooves did not need to be trimmed for aesthetic reasons unless the horses were bothered by the growth. However, Dr. Cerro also acknowledged that the horses should have been brought in for treatment sooner. Further, the horses, specifically the weanlings, should have been in better condition with winter approaching. Dr. Cerro would not have allowed debris in a pasture with horses. The testimony at trial revealed that she was paid by the defense and had prepared a report for the defense that analyzed the body condition score of only thirty horses in order to present a favorable review for the defense.

Claimant Janet Bauman testified that she owned the horses with defendant with the exception of three horses that belonged to defendant's father and son. She later testified that three horses belonged to defendant's father. Bauman testified that defendant was employed as an electrician and worked at Ford Field in Detroit. Therefore, she assisted in caring for the horses when he worked. Bauman testified that the horses were wormed on schedule, although recent health problems suffered by the couple had delayed worming. Bauman testified that she did not notice that the horses had diarrhea in the fall of 2001. She did notice that two horses dramatically lost weight in September 2001, and they took the horses to the veterinarian. She testified that the horses were appropriately separated, and they were given adequate feed. She did not notice halters piercing into the skin of the horses. Bauman testified that they had difficulty obtaining the receipts for the worming medication because the company was going out of business.

Defendant testified that he met with the animal control officer in the spring of 2001, and he was never advised of the nature of any allegation against him. He testified that his horses were pasture horses, and they did not require much care. Because they traveled in the pasture, they did not require regular farrier services. It was an impractical service for defendant to perform because of the number of horses involved. Therefore, he did not perform the service unless the horses were hurt or in pain. If he noticed that hooves needed attention, he took care of the problem immediately. He initially testified that halters were not on the horses, but then stated that if a halter was on a horse, it was never too tight. Defendant did not notice the extensive diarrhea, lameness, or rain rot as alleged by the prosecution. He also opined that an extended abdomen had nothing to do with illness in a horse. Rather, the condition arose from genetics within the breed itself. In essence, defendant opined that the horses were provided with adequate care because they were given food, water, shelter when necessary, and problems were addressed when they arose. Following the conclusion of ten days of trial testimony, the jury convicted defendant of thirteen counts of animal neglect and acquitted him of five counts of animal neglect.

The trial court initially stated that the testimony from the criminal proceeding would be utilized to determine the propriety of civil forfeiture. However, at trial, testimony indicated that Bauman, defendant's son, and defendant's father claimed an ownership interest in all or some of the horses. The prosecutor urged the trial court to disregard the belated ownership claims based

on estoppel. However, the trial court expressly stated that it would not be fair to the claimed owners because they had due process rights. At a subsequent hearing, the prosecutor again urged the trial court to utilize the testimony from trial to determine the propriety of forfeiture. Again, the trial court stated that, at a minimum, a hearing would be held to address ownership and adequacy of care. Although the trial court indicated that it hoped the hearing would be short and the evidence presented at the criminal trial could be utilized if it would help, the trial court nonetheless determined that the claimed owners could submit proofs. At the beginning of the evidentiary hearing, the trial court noted that the parties stipulated to allow the use of the prior testimony taken in the criminal portion of the case. There was no objection to the trial court's statement, and the parties did not place any qualification or limitation on the trial court's ruling. The trial court forfeited any interest in the horses held by defendant and claimant Bauman,<sup>1</sup> concluding that the horses did not receive adequate care, and the innocent owner defense was not raised.

Defendant and claimant first contend that the trial court lacked "legal jurisdiction" to order the forfeiture of the horses because it occurred without proper cause. Defendant seemingly alleges that probable cause to seize the horses was not present and that all horses could not be seized when the criminal complaint only ultimately raised eighteen counts<sup>2</sup> of animal neglect.<sup>3</sup> We disagree. Issues of statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent—the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Under the plain meaning rule, "courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). The legislative history of an act may be examined "to ascertain the reason for the act and the meaning of its provisions." *DeVormer v DeVormer*, 240 Mich App 601, 607; 618 NW2d 39 (2000). Legislative history is valuable when it evidences a legislative intent to repudiate a judicial

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<sup>1</sup> The trial court also forfeited the interests of Edwin Kasben (defendant's father), Kris Kasben (defendant's son), James Hall, and Barbara Kintner. The forfeiture with regard to these individuals is not at issue in this consolidated appeal.

<sup>2</sup> Additional counts were alleged, but were dismissed.

<sup>3</sup> To present an issue for appellate review, it must be identified in the appellant's statement of questions presented. See MCR 7.212(C)(5); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). The statement of questions presented with regard to this issue challenges the "legal jurisdiction" of the trial court in light of MCL 750.53. However, in the discussion section of the issue, appellants also challenge the forfeiture based on MCL 750.50 and the circumstances under which forfeiture is proper. Accordingly, we need not address the issues set forth in the discussion section. *Id.* Nonetheless, I conclude that the challenges raised are without merit.

construction or considers alternatives in statutory language. *In re Certified Question (Kenneth Henes Special Projects v Continental Biomass Industries, Inc)*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003). However, legislative history is afforded little significance when it is not an official view of the legislators and cannot be utilized to create an ambiguity where one does not otherwise exist. *Id.*

MCL 750.53 addresses the seizure of animals and provides:

Arrest of persons and seizure of animals – Persons found violating any of the provisions of the preceding sections of this chapter may be arrested and held without warrant, in like manner as in the case of person found breaking the peace, and it shall be the duty of the person making the arrest to seize all animals and fowls found in the keeping or custody of the person arrested, and which are then being used, or held for use in violation of any of the provisions of the preceding sections of this chapter, and the person making such seizure shall cause such animals or fowls to be at once delivered to a poundmaster of the city, village or township in which the same may be, and it shall be the duty of such poundmaster to receive such animals or fowls, and to hold the same and proceed in regard to them in all respects as provided by law in other cases of animals impounded.

Review of the plain language of this statute reveals that a person who is found violating the animal neglect statute may be arrested and all animals in the care or custody of the person shall be seized. MCL 750.53. In the present case, testimony from the investigating officer indicated that he received a complaint regarding the condition of the horses. He met with defendant and a veterinarian and continued to monitor the herd of horses throughout the spring and summer. The officer testified that he was able to view the horses without entering defendant's property and, in any event, could smell the sores on the horses. When defendant refused continued access to the horses, the trial court ordered that defendant was to make the horses available for inspection. The trial court later held that defendant violated this order and held defendant in contempt. This evidence indicated that defendant was in the process of violating the animal neglect statute.

Because a violation of the animal neglect statute, MCL 750.50, was occurring, it was the duty of the investigating officer to seize "all animals" which were "then being used, or held for use in violation of any of the provisions of the preceding sections of this chapter." MCL 750.53. The statute contains the term "shall" seize which denotes mandatory rather than discretionary action. *Browder, supra*. The phrase "used, or held for use" is not defined in the statute. Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). Where a statute does not define a term, the term as defined in the dictionary may be applied. *Id.* "Use" is defined as "to employ for some purpose, put into service; ... to avail oneself of; apply to one's own purposes." Random House Webster's College Dictionary (2d ed). Thus, the term "use" is broadly defined to include employment for any purpose, and the testimony at trial revealed that the horses were used both as a hobby and as a business venture. Despite the fact that the animals were to be used for sale, they were not provided adequate water, food, and shelter as set forth in MCL 750.50. Accordingly, the trial court properly concluded that MCL 750.53 authorized the seizure of all fifty-three horses in defendant's care or custody

regardless of the fact that charges were not raised based on the condition of each individual horse.<sup>4</sup>

Claimant Bauman alleges that she was denied due process of law when the trial court combined the criminal and civil trials and did not give her the opportunity to contest the forfeiture until the criminal trial was completed. We disagree. Constitutional issues are reviewed de novo as a matter of law. *Studier v Michigan Public School Employees' Retirement Board*, 472 Mich 642, 649; 698 NW2d 350 (2005). Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Procedural due process serves as a limitation on government action and requires government to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id.* at 382. Due process is a flexible concept applied to any adjudication of important rights. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). The procedural protections, which include fundamental fairness, are based on what the individual situation demands. *Id.* Fundamental fairness includes: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the interest of the state or government, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). The opportunity to be heard does not require a full trial-like proceeding. *Id.* However, it does require a hearing such that a party has the chance to learn and respond to the evidence. *Id.*

Applying the above stated principles to the proceedings held in the trial court, claimant Bauman was not denied due process of law. Bauman's ownership interest in the horses was a significant private interest that was at stake. However, there was no risk of an erroneous deprivation in light of the procedure utilized by the trial court. *Dobrzenski, supra*. After the testimony during the criminal trial that multiple individuals owned the horses, the prosecutor urged the trial court to preclude any assertion of an ownership interest based on principles of estoppel. The trial court expressly stated that it would not be fair to the claimed owners of the horses because of their due process rights. When the time for defendant's sentencing arrived, the trial court reiterated that it would hold evidentiary hearings regarding the ownership interest and the adequacy of care. Although the trial court stated that it hoped the proceedings would not last long, there is no indication that the trial court limited the duration of the hearing or the number of witnesses to be presented. At the completion of the hearing, Bauman did not express any need

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<sup>4</sup> Within the discussion section of this issue, defendant alleges that forfeiture was permitted only if defendant did not pay the cost of care pending the criminal trial. However, the trial court did give the defense the opportunity to stop the sale of the horses when it estimated that a bond in the amount of \$353,000 was necessary to govern the care of the horses pending resolution of the appeal process. The trial court concluded that defendant's offer to post property as a bond was insufficient because title was not free and clear to the property.

for a continuance. Moreover, the parties stipulated to allow the use of the testimony presented at the criminal trial to be considered at the forfeiture hearing.<sup>5</sup> Thus, the procedure utilized under the circumstances was proper.

Additionally, the value of additional or substitute procedures appeared inconsequential. *Dobrzanski, supra*. Upon questioning by the court, counsel for Bauman indicated that he was not prepared to identify what testimony could have been presented that had not been submitted at the criminal trial. There was no offer of proof preserved in the lower court record to indicate what information would have been presented at additional hearings. The state had an interest in resolving the matter because it had made arrangements for the care of the horses and had the expense of maintaining the herd. Under the circumstances, the procedure utilized by the trial court ensured that due process was afforded claimant Bauman after it became aware of her claimed interest.<sup>6</sup> Claimant Bauman was advised of the nature of the proceedings and was given the opportunity to be heard.

Defendant's third claim of error challenges the order of restitution, alleging that restitution could not be ordered because the animals were forfeited. I disagree and dissent from the majority's holding. MCL 750.50(3) and (5) of the animal neglect statute provide as follows:

(3) If an animal is impounded and is being held by an animal control shelter or its designee or an animal protection shelter or its designee or a licensed veterinarian pending the outcome of a criminal action charging a violation of this section or section 50b, before final disposition of the criminal charge, the prosecuting attorney may file a civil action in the court that has jurisdiction of the criminal action, requesting that the court issue an order forfeiting the animal to the animal control shelter or animal protection shelter or to a licensed veterinarian before final disposition of the criminal charge. The prosecuting attorney shall serve a true copy of the summons and complaint upon the defendant and upon a person with a known ownership interest or known security interest in the animal or a person who has filed a lien with the secretary of state in an animal involved in the

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<sup>5</sup> On appeal, appellate counsel acknowledges the stipulation, but alleges that claimant Bauman did not agree to the use of "secret evidence." It is further alleged that the stipulation was entered into because of the prior district court rulings and the denial of an interlocutory claim of appeal to the circuit court. There was no limitation or qualification placed on the stipulation by trial counsel. Additionally, a party may not harbor error as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Stated otherwise, a party may not assign error on appeal to something that it did not object to or deemed proper at trial. *Id.*

<sup>6</sup> Within the discussion section of this issue, it is alleged that claimant Bauman was denied an impartial decision maker. We reiterate that an issue is waived on appeal when it is not raised in the statement of questions presented. *Wallad v Access BIDCO, Inc*, 236 Mich App 303, 309; 600 NW2d 664 (1999); MCR 7.212(C)(5). Thus, this issue is waived. Furthermore, defendant and claimant Bauman did not move for disqualification before the trial judge and did not seek review before the chief judge. See *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997); MCR 2.003. Thus, this issue is not preserved for appellate review. *Meagher, supra*.

pending action. The forfeiture of an animal under this section encumbered by a security interest is subject to the interest of the holder of the security interest who did not have prior knowledge of, or consent to the commission of the crime. Upon the filing of the civil action, the court shall set a hearing on the complaint. The hearing shall be conducted within 14 days of the filing of the civil action, or as soon as practicable. The hearing shall be before a judge without a jury. At the hearing, the prosecuting attorney has the burden of establishing by a preponderance of the evidence that a violation of this section or section 50b occurred. If the court finds that the prosecuting attorney has met this burden, the court shall order immediate forfeiture of the animal to the animal control shelter or animal protection shelter or the licensed veterinarian unless the defendant, within 72 hours of the hearing, submits to the court clerk cash or other form of security in an amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the animal control shelter or animal protection shelter or the licensed veterinarian in caring for the animal from the date of initial impoundment to the date of trial. If cash or other security has been submitted, and the trial in the action is continued at a later date, any order of continuance shall require the defendant to submit additional cash or security in an amount determined by the court to be sufficient to repay all additional reasonable costs anticipated to be incurred by the animal control shelter or animal protection shelter or the licensed veterinarian in caring for the animal from the date of impoundment to the date of final disposition of the criminal charges. The testimony of a person at a hearing held under this subsection is not admissible against him or her in any criminal proceeding except in a criminal prosecution for perjury. The testimony of a person at a hearing held under this subsection does not waive the person's constitutional right against self-incrimination. An animal seized under this section or section 50b is not subject to any other civil action pending the final judgment of the forfeiture action under this subsection.

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(5) If forfeiture is not ordered pursuant to subsection (3), as a part of the sentence for a violation of subsection (2), the court may order the defendant to pay the costs of the care, housing, and veterinary medical care for the animal, as applicable. If the court does not order a defendant to pay all of the applicable costs listed in this subsection, or orders only partial payment of these costs, the court shall state on the record the reason for that action.

Review of the record reveals that the prosecutor sought forfeiture of the animals in light of the fact that defendant had prior complaints of animal neglect raised against him, and his horses had been monitored for months with little improvement to the health of the horses heading into the critical winter months. Initially, it was decided that the criminal trial and forfeiture proceeding would be held simultaneously for reasons of judicial economy. However, the agreement was derailed when, during trial, defendant alleged that he was not the sole owner of the horses. Rather, it was asserted that defendant's father, defendant's son, and Bauman all held an interest

in the horses. Consequently, the trial court concluded that it had to hold additional hearings to afford those alleged owners their due process rights.

Although it may have been intended that MCL 750.50(3) would be complied with, the process that occurred in this unique case made that impossible. Although before final disposition of the criminal charge, the prosecutor “may” file a civil action seeking forfeiture, in this case, the hearing was not conducted within fourteen days or as soon as practicable. MCL 750.50(3). Defendant’s newly raised ownership claims required that a final forfeiture could not be ordered prior to or at the conclusion of the criminal proceeding. Defendant then asserted that both forfeiture and restitution could not be ordered because the prosecutor did not comply with MCL 750.50(3). Moreover, defendant also asserted that he was not allowed to comply with the financing requirements of MCL 750.50(3).<sup>7</sup> That is, defendant alleged that he was not given the opportunity to file security within seventy-two hours of the forfeiture hearing.

In response to that argument, the prosecutor noted the unique circumstances that had occurred and alleged that, irrespective of compliance with MCL 750.50(3), it could proceed to seek forfeiture of the horses through a traditional in rem proceeding. The trial court agreed that, in the alternative, the prosecutor could proceed according to the common law. I agree. Forfeiture proceedings are in rem proceedings, and the prosecutor has the burden of proving its case by a preponderance of the evidence. *In re Forfeiture of \$25,505*, 220 Mich App 572, 574; 560 NW2d 341 (1996). While the preemption doctrine is traditionally applied when a federal law takes precedence over a state law, preemption may also be applied when a state statute acts to preempt the common law. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 543-544; 683 NW2d 200 (2004). To determine whether a statutory scheme preempts the common law on a particular subject matter is determined by examining legislative intent. *Id.* at 545. To determine whether the common law was preempted, in general, one examines the legislation to determine whether it prescribes in detail a course of conduct to pursue and the parties and things affected. Where it designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with that particular subject matter. *Id.* citing 2A Sands, Sutherland Statutory Construction (4<sup>th</sup> ed), § 50.05, pp 440-441. As previously noted, when examining legislation, courts give the ordinary and accepted meaning to the mandatory word “shall” and the permissive word “may.” *Browder, supra*.

Review of MCL 750.50(3) reveals that it does not preempt the common law, and the prosecutor may still utilize in rem proceedings for forfeiture. MCL 750.50(3) provides an orderly manner in which forfeiture of animals may occur prior to disposition of criminal charges. However, the statute is permissive as evidenced by its use of the word “may.” It is not required that the prosecutor file the civil forfeiture action and hold a hearing before disposition of the criminal charges. The statute, however, is designed to allow that option to prevent the

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<sup>7</sup> The trial court did examine defendant’s claim that he could post a bond based on property valued at one million dollars. However, the trial court found that the property was not suitable based on encumbrances.

prosecuting county from incurring the potentially large cost of caring for animals pending the outcome of the criminal proceeding.<sup>8</sup>

MCL 750.50(5) provides that “[i]f forfeiture is not ordered pursuant to subsection (3), as a part of the sentence for a violation of subsection (2), the court may order the defendant to pay the costs of the care, housing, and veterinary medical care for the animal as applicable.” Based on my review of the record, forfeiture was not ordered in accordance with MCL 750.50(3). Forfeiture was not ordered promptly before the disposition of the criminal case. Rather, defendant’s actions in delaying the proceedings, which included firing his attorney and asserting ownership by others,<sup>9</sup> prevented the prompt disposition originally anticipated by the agreement to hold both the civil forfeiture and criminal trial simultaneously. Moreover, if forfeiture had been ordered in accordance with MCL 750.50(3), there would not be a need to order defendant to pay the costs for the care, housing, and veterinary care. If there had been a prompt forfeiture, the costs of care and housing for the horses would not have been incurred. Consequently, I would hold that the trial court did not err in ordering both the forfeiture of the horses and restitution.<sup>10</sup>

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<sup>8</sup> When determining the applicability of preemption, one may examine the legislative intent. Review of the legislative analysis accompanying the statutory amendments reveal that the statute was amended to account for situations such as this one. Earlier cases had involved large numbers of animals where the prosecution was a significant cost to the county. Under prior versions of MCL 750.50, the statute merely allowed for prosecuting the owners for animal cruelty, but they remained the lawful owners of the animals. The statutory amendments were designed to prevent continued ownership by individuals convicted of animal neglect or cruelty and to protect the county from incurring the high cost of the prosecution and the care and maintenance of the animals as evidenced by the plain language of the statute.

<sup>9</sup> Throughout the proceedings below, it was revealed that defendant continually obstructed the investigation into the health of the horses. Defendant repeatedly moved the horses to different farms and locations and misrepresented the number of horses that he owned. Although there was an order that prevented defendant from this activity, defendant continued to violate the court’s orders. For example, defendant reportedly “sold” the horses to James Hall and Barbara Kintner. When the trial court learned that this transaction occurred, the trial court ordered Hall to pay any funds to the court. However, Hall then revealed that the transaction was more of a “barter” situation. Ultimately, defendant was held in contempt for violating the court’s orders. When it came time to auction the horses, the sheriff did not sell the horses individually which would have yielded the highest return. It was learned that defendant had individuals who would act on his behalf and purchase certain horses. To prevent defendant from regaining possession of the horses, the decision was made to sell the horses in groups. The trial court utilized the funds garnered from the sale of the horses to reduce the amount of restitution owed by defendant. The amount would have been further reduced if the sheriff had believed that the horses could be sold individually.

<sup>10</sup> One could argue that prosecutors are now on notice that there can be no deviation from the terms of MCL 750.50(3), and prompt forfeiture of animals must occur to prevent this situation from occurring. However, this situation was further complicated by the location. The trial judge traveled to different circuits, and the courtroom availability was also an issue in the case. This further hampered the disposition of the case.

In summary, MCL 750.50(3) and (5) is a permissive statute providing that if forfeiture is not ordered as a part of the sentence for violation of the animal neglect statute, MCL 750.50(2), the court “may” order defendant to pay restitution for the care of the animals. The trial court did not err in ordering both the forfeiture of the animals and restitution. The forfeiture was sought by the prosecution in a proceeding separate and distinct from the criminal trial, and the prosecutor stated that it would proceed in accordance with common law forfeiture in light of defendant’s objections. The forfeiture was not ordered as a part of the sentence in the criminal trial. Additionally, the plain language of MCL 750.50 contains no limitation to preclude the prosecution from seeking civil forfeiture and restitution when the forfeiture is not ordered as part of the criminal proceeding. *Neal, supra*. Accordingly, I would hold that the trial court did not err in ordering both the forfeiture of the animals and the restitution for the care of the animals pending the final decision regarding forfeiture.

Lastly, defendant contends that the circuit court erred in awarding sanctions for the appeal of the trial court’s order denying the motion to set aside restitution. We disagree. The finding that an appeal is vexatious is reviewed for clear error. *Davenport v Grosse Point Farms Zoning Bd*, 210 Mich App 400, 408; 534 NW2d 143 (1995). “Damages for a vexatious appeal may be awarded where (1) the appeal was taken for purposes of hindrance or undue delay, (2) there is no meritorious issue on appeal or (3) the record is grossly lacking in the requirements.” *Wojas v Rosati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). Based on the record available, we cannot conclude that the circuit court’s decision to award sanctions was clearly erroneous.

Defendant filed an appeal as of right with the circuit court after the criminal action and civil forfeiture case were completed in district court. At that time, the order of restitution was challenged. However, defendant never argued, in the alternative, that if the order of restitution was upheld, that the restitution amount was unreasonable.

After the criminal convictions and the civil forfeiture were upheld on appeal to the circuit court, the prosecutor filed a writ of garnishment in the amount of \$18,040.32. Defendant objected to the writ of garnishment in the trial court, alleging that both restitution and forfeiture were not permitted and that a hearing was never held to determine the amount of costs and restitution. The trial court explained that the total amount of court costs was \$5,792.45, and a payment of \$5200 left a balance of \$592.45. The trial court also explained that the amount due and owing following the set off from the sheriff’s sale of the horses was \$17,447.87 for a combined balance of \$18,040.32. When defendant continued to assert that there was no explanation or hearing to substantiate the garnishment, the trial court told defendant that he was “too smart” to claim that hearings were not held regarding these issues.

Defendant filed a claim of appeal to circuit court. When the circuit court received the claim of appeal, it held that the issue of restitution and forfeiture had been resolved in the prior appeal. However, the circuit court noted that the prosecutor improperly combined the civil and criminal garnishment into one order, and it should be separated into two garnishment orders.<sup>11</sup>

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<sup>11</sup> Instead of combining the outstanding costs and fees in the amount of \$18,040.32, the circuit court, acting on appeal, indicated that each garnishment order of \$592.45 and \$17,447.87 should  
(continued...)

The circuit court advised defendant that the merits of the forfeiture and the restitution would not be entertained because of the prior appeal. Therefore, the circuit court indicated that it would entertain procedural objections only to the writ of garnishment. Instead of pursuing this action as expressly directed by the circuit court, once again, defendant raised the issues of restitution, forfeiture, and the assessed costs. Consequently, the circuit court imposed sanctions of \$250 and dismissed the claim of appeal.

Under the circumstances of this case, the circuit court's assessment of a \$250 sanction for the filing of the claim of appeal was proper. Defendant did not have an appeal as of right regarding the issue of restitution and forfeiture because the amount had been resolved, but not challenged in the prior appeal. Defendant alleged that hearings were not held to establish the amount of forfeiture and restitution when in fact multiple hearings were held. The circuit court expressly set forth the bounds of what it would entertain and expressly stated that only procedural objections to the garnishment would be raised. Despite the circuit court's express instruction, defendant raised the issue of the propriety of forfeiture and restitution. Accordingly, the circuit court did not clearly err in imposing the sanction. *Davenport, supra*.

I would affirm in all respects.

/s/ Karen M. Fort Hood

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(...continued)

remain separate.